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Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St SW
Washington, DC 20554

May 15th, 2017

Notice of Ex Parte

In re Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84; In re Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT Docket No. 17-79

Dear Ms. Dortch,

On Monday, May 15th, 2017, Mike Godwin and Tom Struble, of the R Street Institute, met with FCC Chairman Ajit Pai, Brian Hart, Director of the Office of Media Relations, and Nathan Leamer, Policy Advisor for Chairman Pai. We discussed the two recent Notices of Proposed Rulemaking on ways the FCC can work to accelerate broadband deployment and promote infrastructure investment.¹

We feel that closing the Digital Divide should be the FCC's top priority. Thus, we stressed to the Commission that it should actively pursue all available opportunities to promote broadband deployment and infrastructure investment. Other proceedings at the FCC may generate more attention, but the importance of broadband deployment and competition cannot be overstated.

On the question of legal authority, we pointed out that the Commission's "ancillary authority" doctrine is still alive and well.² Accordingly, the Commission may rely on

¹ Notice of Proposed Rulemaking, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84 (Apr. 21, 2017) ["Wireline NPRM"], available at <https://goo.gl/WDB92z>; Notice of Proposed Rulemaking, *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79 (Apr. 21, 2017) ["Wireless NPRM"], available at <https://goo.gl/xxzGVW>.

² See *United States v. Sw. Cable*, 392 U.S. 157, 178 (1968) (establishing doctrine of "ancillary authority" under the Communications Act); *FCC v. Midwest Video Corp.*, 440 U.S. 689, 695 (1979) (upholding "ancillary authority" doctrine, but finding that the FCC's actions were not "reasonably ancillary" to the Commission's jurisdictional grant); *Am. Library Ass'n. v. FCC*, 406 F.3d 689, 700–05 (D.C. Cir. 2005) (defining the contours of the FCC's ancillary authority doctrine, and holding that the Commission's receiver apparatus regulations did not comply therewith); *Comcast Corp. v.*

Sections 201(b), 253, and 257 as authority for whatever actions it takes in these dockets to promote broadband deployment and competition, regardless of whether broadband service remains classified under Title II, so long as it can show that such actions are “reasonably ancillary to the effective performance of the Commission’s various responsibilities,” under the Communications Act.³ It is our position that the actions proposed by the Commission in the Wireline NPRM and Wireless NPRM would both satisfy this test.

Finally, we highlighted various zero-rating (a.k.a. sponsored data) programs that mobile carriers have developed in recent years — including T-Mobile’s *Binge On* program⁴ and *Wikipedia Zero*⁵ — which appear to be both pro-consumer and pro-competitive in nature. These programs are allowable today, under existing rules, and can be useful ways to promote broadband deployment and competition among ISPs, by boosting consumer uptake and, in some cases, providing ISPs with supplemental revenue streams that can be reinvested into network infrastructure. We encouraged the Commission to continue fostering development of these innovative service offerings going forward.

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In accordance with Section 1.1206(b) of the Commission’s rules,⁶ this letter is being filed with your office. If you have any questions, please contact the undersigned.

Respectfully submitted,

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FCC, 600 F.3d 642 (D.C. Cir. 2010) (holding that the Commission had misused its ancillary authority by failing to anchor it to a jurisdictional grant of authority within the Communications Act).

³ See *United States v. Sw. Cable*, 392 U.S. at 178.

⁴ T-Mobile, *Binge On* (last visited May 8th, 2017), available at <https://goo.gl/ynOc5Z>.

⁵ Wikimedia Found., *Wikipedia Zero* (last visited May 8th, 2017), available at <https://goo.gl/AKGyAX>.

⁶ 47 C.F.R. § 1.1206(b).

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